United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

77-7227

United States Court of Appeals
FOR THE SECOND CIRCUIT

THE MUSLIM COMMERCIAL BANK LTD.,
Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,
Defendants.

PUBALI BANK, RUPALI BANK, SONALI BANK and
ADAMJEE JUTE MILLS, LTD.,
Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and
WATERMAN STEAMSHIP CORP.,
Defendants.

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Preliminary Statement

This appeal is taken from (i) an Order of the District Court (Hon. Lawrence W. Pierce) granting plaintiff, The Muslim Commercial Bank Ltd. ("Muslim Bank") summary judgment and (ii) final judgment entered thereon in the sum of $521,568.00, plus interest.

Muslim Bank, and Pubali Bank, Rupali Bank, Sonali Bank and Adamjee Jute Mills, Ltd. each brought actions

to recover the purchase price for a quantity of jute, to which each claims title. The actions were consolidated for trial. The jute was shipped from Bangladesh (then East Pakistan) to the Dominican Republic during the war for independence which climaxed with the emergence of the new State of Bangladesh. Negotiable bills of lading embodying title to the jute remained in Bangladesh and were nationalized.

In an unprecedented ruling, the Court extended the long arm of United States public policy across the borders of a sovereign foreign state, nullifying a decree of that state which impacted property located totally without the borders of the United States and owned by foreign nationals.

For the first time, a Court acting only as a forum (and a dubious one at that as is shown below) in a dispute over an essentially foreign transaction between foreign nationals, has interposed the public policy of the forum not merely to deny access to the Court, but as the substantive law in place of applicable foreign law to effect a disposition on the merits; notwithstanding that the United States lacks prescriptive jurisdiction or policy interest.

Established conflict of law principles strictly limit the interposition of the substantive law of the forum to those disputes to which the forum has an important relationship. No such relationship exists in the instant case.

Issues Presented

1. Whether a Court acting as a forum in a dispute between two non-resident foreign nationals with respect to a foreign transaction may apply the public policy of the forum not merely to deny one of the parties enforcement of its claim, but to eliminate the claim by determining the dispute on the merits.

2. Whether the Act of State Doctrine precludes examination of the act of a sovereign state which nationalizes a negotiable bill of lading located within its territory which embodies title to personalty located within a third state.

3. Whether the nationalization by a belligerent state of enemy alien property located outside of the United States violates fundamental public policy.

Statement of the Case

The Emergence of Bangladesh

Bangladesh first appeared on the international horizon on April 10, 1971, when it declared its independence from Pakistan, effective March 26, 1971 (JA 39, 159).* A war ensued which took a tremendous toll in human suffering, lives and property. In early December 1971, the tide of war turned in favor of Bangladesh and on December 16, 1971, Pakistan troops surrendered (JA 40). The new Republic of Bangladesh was born, succeeding Pakistan as sovereign in East Pakistan.

The catastrophic consequences of the brutal war to Bangladesh—its people and its economy—are matters of notorious record. N.Y. Times, March 28, 1971, p. 1, col. 7; id. March 30, 1971, p. 10, col. 4; id. May 10, 1971, p. 4, col. 4; id. August 10, 1971, p. 35, col. 3. The government of the United States recognized Bangladesh on April 4, 1972 (JA 41). The state of war between Bangladesh and Pakistan continues to this day, although Pakistan has now recognized the new Republic (JA 41).

The Subject Transaction

On or about November 10, 1971, in the territory of what is now Bangladesh (then East Pakistan), Waterman Steam-

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* References are to the Joint Appendix ("JA").

ship Corp. ("Waterman"), an ocean carrier, issued two order bills of lading in connection with the shipment of a quantity of jute from the port of Chalna to the ultimate purchaser of the jute, Consejo Estatal Del Azucar, in the Dominican Republic (JA 37, 155, 157). The bills were payable to the order of The Muslim Commercial Bank Ltd., Dacca (JA 39). They were to be delivered in New York against payment to the holder of the bills in English Sterling by First National City Bank acting on behalf of M. Golodetz & Company, a New York jute brokerage firm. Golodetz acted as an intermediary buyer in the transaction between Adamjee, the manufacturer,* and the Dominican Republic purchaser (JA 37, 38). The jute arrived in the Dominican Republic on or about December 17, 1971 (JA 38). Except for the brief period incident to presentation, the negotiable bills of lading never left Bangladesh (JA 39). They were seized by the government of the new Peoples Republic of Bangladesh and thereafter nationalized (JA 40, 164).

In order to secure the release of the Dominican bound jute in the absence of title documents, Golodetz delivered to the carrier, Waterman, an undertaking indemnifying it against claims for wrongful delivery of the jute (JA 38).

On December 29, 1971, after having taken control of the machinery of government on December 16, the government of Bangladesh, by Administrative Order, assumed control of all branches of Pakistan banks located in Bangladesh, including those of the Muslim Bank (JA 40). By Order dated February 28, 1972, the government of Bangladesh expropriated all property owned by enemy aliens, i.e., citizens of Pakistan, including the property of banks and indebtedness to Pakistani nationals, and vested them in the Republic of Bangladesh (JA 40, 164, 165). By Order dated

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* Adamjee Jute Mills Ltd. ("Adamjee") was the seller of the jute. Adamjee was organized under the laws of Pakistan. Its head and registered office, and only jute processing mill, was located in East Pakistan (now Bangladesh) (JA 29-30).

March 26, 1972, Bangladesh vested in plaintiff Rupali Bank, the previously nationalized assets of Muslim Bank (JA 28).

Thus, by operation of law, Rupali Bank succeeded to the ownership of the two bills of lading in issue.

Early in 1972, the bills of lading and related documents were presented for payment in New York by correspondent banks acting on behalf of Rupali Bank (JA 39, 155, 157). Golodetz failed to make payment (JA 39).

This consolidated action was thereafter commenced by Rupali Bank and by Muslim Bank each seeking payment from Golodetz of the purchase price of the jute. Golodetz, as stakeholder, thereafter placed the purchase price of the jute in escrow (JA 38) and has been discharged from liability. Waterman has likewise been discharged.

The District Court granted Muslim Bank's motion for summary judgment. The Court reasoned that since the jute represented by the nationalized bills of lading was to be paid for in New York, the nationalization was not a "fait accompli" and that, therefore, the Act of State Doctrine does not necessitate application and acceptance of Bangladesh law; that the Court was free to apply United States substantive law, specifically its public policy, to the transaction; that United States public policy precluded recognition of the transfer of title to the jute as a consequence of expropriation; that barring such recognition, title to the jute continued to reside in Muslim Bank; and that Muslim Bank, therefore, was entitled to recover the purchase price of the jute in this action.

POINT I

Where, as here, the Court acts only as a forum to try a foreign cause of action, it can properly apply local public policy only to the extent of denying a remedy in the forum based on objectionable foreign law and not to foreclose the matter on the merits, which should be determined by a forum having genuine interest in the matter.

It is a widely accepted principle of conflict of laws that:

> No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum. Restatement (Second), Conflict of Laws § 90 (1971).

But, ancillary to the above rule is one which precludes application of local public policy to determine a cause on the merits, where the forum has no important connection with the transaction. As was recognized over half a century ago by Mr. Justice Brandeis:

> A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done. *Bradford Elec. Light Co.* v. *Clapper,* 286 U.S. 145, 160 (1932); see *Bond* v. *Hume,* 243 U.S. 15, 21-22 (1917).

Thus, the law carefully distinguishes between a procedural dismissal and a determination having res judicata impact. See *Warner* v. *Buffalo Drydock Co.,* 67 F.2d 540 (2d Cir. 1933), cert. denied, 291 U.S. 678 (1934). The

determination as to which disposition is appropriate in a particular case requires careful analysis of the quality of the relationship of the forum to the cause. As Professor Paulsen and Dean Sovern concluded in their leading study, cases which apply local law are almost always those with which the forum has some important connection.

> The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it. Paulsen & Sovern, "Public Policy" in the Conflict of Laws, 56 Colum. L. Rev. 969, 981 (1956).

Similarly, the Supreme Court has noted:

> Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws . . ., it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 150 (1934).

Only important local connections, such as the delivery of the subject property into the jurisdiction, can justify the forum's imposition of local substantive law on an essentially foreign transaction.

Viewed in international jurisdictional terms, in the instant case, there is an absence of prescriptive jurisdiction in the forum, i.e., a lack of right to attach legal consequences to conduct of foreign nationals outside its borders. The right to prescribe extraterritorially is carefully and severely restricted to those matters having an important impact on the acting state, such as threats to its security.

See Restatement (Second), Foreign Relations Law of the United States § 33 (1965). See also id. § 30. There is no, nor could there be any, suggestion that the instant case raises any of the considerations contemplated by the Restatement.

In order that the instant case be viewed in correct perspective with respect to these applicable legal principles, it is necessary to highlight controlling factual distinctions between this case and those relied upon by the District Court. Unlike *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966); and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924 (1968), all of which substantively applied United States law and policy in refusing enforcement to foreign nationalizations, there is here no attempted expropriation of assets located in the United States—or even of assets which had a nexus with the United States by virtue of their origin or destination in the United States. Nor is there a dispute over the proceeds of any such United States connected property. Nor is there present here an American buyer or seller. Indeed, the jute broker's New York origin is the only connecting, albeit ephemeral, United States link to an otherwise foreign transaction; and the broker's interest is only that of a conduit between the real parties, both of whom are foreign nationals. As the facts set forth in the opinion of the District Court make clear, this is a dispute between foreign nationals over title to property located in a foreign state (JA 224-25).

The litigation had its genesis over the disputed title to a quantity of jute shipped directly from East Pakistan (now Bangladesh) to a buyer in the Dominican Republic. Neither the jute, nor the negotiable bills of lading which embody title, ever came in contact with United States territory. The bills were issued in East Pakistan and expropriated

and seized in that same territory by the successor sovereign, the Peoples Republic of Bangladesh, as an incident to the state of war between those sovereign states. The jute found its first and ultimate resting place in the Dominican Republic. The present disputants are a corporate instrumentality of Bangladesh, and a like instrumentality of Pakistan; neither has an office in the United States. Indeed, United States interests are non-existent.

Far more factually compelling cases than the one at hand have passed before United States courts, yet these courts have resisted the temptation to give the forum law extraterritorial substantive effect. E.g., *Tramontara* v. *S.A. Empresa de Viacao Aerea Rio Grandense,* 350 F.2d 468 (D.C. Cir. 1965), cert. denied sub nom. *Tramontara* v. *Varig Airlines,* 383 U.S. 943 (1966); *Holzer* v. *Deutsche Reichsbahngesellschaft,* 277 N.Y. 474, 14 N.E. 2d 798 (1938).

It is evident that the relationship of the United States to the instant action is gossamer. New York and the United States represent only a bare forum—a place where the purchase price of the jute may readily be collected—and nothing more. But neither the fact that money may be recovered here, *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.,* 292 U.S. at 150, nor that the residence of one or more parties is here, *Home Ins. Co.* v. *Dick,* 281 U.S. 397 (1930); *Tramontara* v. *S.A. Empresa de Viacao Aerea Rio Grandense,* supra, justifies the District Court's disregard for applicable foreign law in a foreign transaction in favor of the substantive law of the forum. The law of Bangladesh—where the transaction originated and where the bills of lading are located—is obviously that most closely concerned with the instant transaction. See Restatement (Second), Conflict of Laws § 248 (1971). The law of the Dominican Republic, the situs of the jute, may also be relevant. See Restatement (Second), Conflict of Laws § 244(2) (1971). However, the District Court looked to the laws of neither jurisdiction.

After analyzing the stipulated facts and looking to the law of Bangladesh, the District Court concluded that the act of Bangladesh in nationalizing the bills of lading violated "American law and policy". (JA 233-34) It thereupon fell into error for, without further analysis, it leapt to the conclusion that "development [of foreign law] is unnecessary" (JA 234); it then applied United States law as the appropriate substantive law and granted summary judgment to Muslim Bank.

The forum may surely withhold its favors if it finds governing foreign law violative of "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal". *Loucks* v. *Standard Oil Co.,* 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918). But just as surely it may not impose upon foreign litigants to a transaction having no important relationship to the United States, our "deep-rooted tradition" or our "conception of good morals" to finally and forever dispose of their dispute. Such an approach smacks of a condescension and paternalism hardly appropriate to a pluralistic world society in the last decades of the twentieth century.

If, therefore, this Court agrees with the District Court, notwithstanding appellant's arguments below, that the foreign law in question violates United States public policy, it is submitted that the proper remedy is dismissal, and not summary judgment. This is a matter which should be left to the two countries themselves to work out on a government to government basis rather than having a bare forum country seek on an ad hoc basis to impose its policy.*

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* A dismissal of the action would not leave the parties in limbo. Diplomatic negotiations—an appropriate means of disposing of outstanding questions between belligerent states—would

(footnote continued on following page)

POINT II

The Act of State Doctrine compels judicial recognition of the nationalization of negotiable bills of lading effected within the territory of Bangladesh, and the legal consequences flowing therefrom.

The Situs of the Property and Applicable Law

The contesting Bangladesh and Pakistan parties herein are in agreement with respect to two crucial facts—that the bills of lading were issued in what is now Bangladesh and were physically present in Bangladesh territory at the time of their nationalization (JA 37, 39). These points are decisionally significant in that they constitute the factual underpinnings for the crucial determination as to whether the bills constituted documents of title to the goods they represented. For if the answer is in the affirmative, the transfer of title effected within the territory of Bangladesh is conclusive upon this Court under the Act of State Doctrine. The initial inquiry—involving a conflict of laws determination—must therefore be as to the substantive law which governs the character and attributes of the bills of lading in issue.

The answer to the conflicts inquiry is well established. To determine the character and attributes of the bills, the

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(footnote continued from preceding page)

undoubtedly be initiated. Such negotiations are presently proceeding between the respective governments of Bangladesh and Pakistan on a number of problems. See N.Y. Times, Feb. 23, 1974, p. 1, col. 5; id. Feb. 28, 1974, p. 13, col. 1; id. Apr. 6, 1974, p. 10, col. 3. Recently, satellite telecommunications links between the two countries have been initiated as a result of negotiations. N.Y. Times, Nov. 1, 1976, p. 5, col. 1. Indeed, a case presently pending in this Circuit, between Bangladesh Bank and State Bank of Pakistan, has been put over by the Court at the request of both Bangladesh and Pakistan to afford the parties time to settle their dispute by diplomatic means. *Bangladesh Bank* v. *Brown Brothers Harriman & Co.*, 75 Civ. 375 (CLB) (S.D.N.Y.).

forum looks to the laws of the locus of the chattels when the bills were issued—in the instant case, East Pakistan (now Bangladesh).

> Whether the title to a chattel is embodied in a document is determined by the local law of the state where the chattel was at the time the document was issued. Restatement (Second), Conflict of Laws § 248(1); see id., § 61, comment a; cf. *United States* v. *Guaranty Trust Co.*, 293 U.S. 340 (1934).*

Moreover, the law of the situs of a title document may affect interests in the underlying chattel. Restatement (Second), Conflict of Laws § 62.

An examination of applicable law shows beyond peradventure that the bills of lading in issue are, indeed, title documents, embodying title to the chattels they describe.

When Bangladesh became a nation it adopted the then laws of Pakistan as its own. These laws, in turn, look to both Indian law and English common law.** Insofar as is here relevant with respect to the bills of lading in issue, the laws of all three nations speak as one.

Under the Bills of Lading Act of 1856, 2 Anwar Ali's Laws of Pakistan 211-12 (Exhibit B annexed), Pakistan embraced the bill of lading as a document of title and it

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* The only choice of law reference in the bills of lading refers to the Carriage of Goods By Sea Act of 1936, 49 Stat. 1207 (1936), 46 U.S.C. §§ 1300-15 (1970). However, this statute deals only with the liabilities and immunities of ocean carriers, which are not in issue here; it does not deal with the attributes of the bills of lading as documents of title. As indicated above, this is governed by the laws of the issuing state.

** An expert witness for Muslim Bank, G.H. Malik, testified to this effect in an earlier case which was tried in the Eastern District of Pennsylvania. *Rupali Bank* v. *Provident National Bank*, Civ. No. 72-1653 (E.D. Pa.) 2 Trial Transcript 132-33 (Exhibit A annexed).

has so remained. See Pandey, Elements of Commercial Law 373-74 (1965); Islam, Principles of Commercial Law 389 (1967); Chaudhary, Mercantile Law in Pakistan 455 (1971).

The like law of India was succinctly stated in *Malabar Steamship Co.* v. *Central Bank of India, Ltd.*, 184 I.C. 226, 230 (Sind Jud. Comm'r Ct. 1938) (Exhibit C annexed):

> [A] bill of lading is a document of title; it is a symbol of the goods; it represents the goods themselves. . . . [T]he bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves has by mercantile usage the same effect as an actual delivery in the circumstances.

The Bangladesh, Pakistan and India laws are all offspring of the two hundred year old decision of the House of Lords in *Lickbarrow* v. *Mason* (1793) 2 H.Bl. 211 (Exhibit D annexed), which held the bill of lading to be a title document.

The rule that a bill of lading embodies ownership to the goods and that the transfer of title to a bill of lading effects transfer of title to the goods derives from the highest principles of commercial expediency. Its role in contemporary trade usage is at least as important as its historical posture. As described by one commentator:

> The modern policy of the law is to cultivate the utmost freedom of commercial transactions. Bills of lading and other documents of title perform a special function. They are regarded as so much cotton, grain or other articles of merchandise, in that they are symbols of ownership of the goods they cover. If a document of title is the symbol of goods in any real sense it must follow that the symbol is the exclusive means of

> dealing with the goods. Delivery of the symbol cannot amount to a real delivery unless the buyer can be confident that the symbolic delivery excludes the possibility of other dealings with the goods without his consent. McCarthy, Jurisdiction Over Chattels, The Title to Which is Embodied in a Document, 31 N.D.L. Rev. 160, 162 (1955).

The rationale that underlies, in part, the Act of State Doctrine—the demand for certainty of title in international commerce—applies with the same force to bills of lading as it does to sugar, hides or other tangibles.

The teaching of the above authorities is five-fold:

(i) Since the bills of lading in controversy were issued in the territory of what then was Pakistan (now Bangladesh), the laws of that State govern the validity and characteristics of those documents. Under those laws, the bills constitute documents of title.

(ii) Under the laws of Pakistan and Bangladesh (which are consistent with general usage under the law of merchant), the owner of a bill of lading which is a document of title, owns the underlying chattels.

(iii) The jurisdiction in which a bill of lading embodying title to a chattel is located, can effect a change in ownership of the bill and, thereby, of the underlying chattel which it embodies.

(iv) The bills of lading in the instant case, governed as they were by Bangladesh law because of their origin and situs there, were vested in the Republic of Bangladesh by the Order of February 28, 1972.

(v) Unless United States public policy is to reach into Bangladesh to bar the normal application of Bangladesh substantive law to property within its territory, title to the bills of lading and, therefore, the underlying jute, is conclusively deemed to have vested in the Republic of Bangladesh.

The Act of State Doctrine

The Act of State Doctrine embodies the principle that "the courts of one country will not sit in judgment on the sovereign acts of the government of another done within its own territory." *Underhill* v. *Hernandez,* 168 U.S. 250, 252 (1897); see *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297 (1918); *Ricaud* v. *American Metal Co.,* 246 U.S. 304 (1918). The Doctrine applies both to tangibles and intangibles. *Menendez* v. *Saks & Co.,* 485 F.2d 1355, 1364 (2d Cir. 1973), rev'd on other grounds sub nom. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba,* 425 U.S. 682 (1976); *Dougherty* v. *Equitable Life Assur. Soc'y.,* 266 N.Y. 71, 87-88, 193 N.E. 897, 902 (1934).

In *Oetjen* the property nationalized was hides, in *Ricaud* it was lead bullion, in *Dougherty* insurance contracts, and in *Sabbatino* sugar. In the instant case two negotiable bills of lading, issued and physically present in the acting state, were the objects of nationalization.

The Act of State Doctrine evolved as a judicial policy based upon the essential recognition of the separation of governmental functions among the branches of government. In the words of Mr. Justice Harlan, it reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 423. It is also a recognition of the long governing principle of international relations that "[t]he authority of a nation within its own territory is absolute and exclusive." *Church* v. *Hubbart,* 6 U.S. (2 Cranch) 187, 234 (1804).

In the instant case, the District Court erroneously reasoned that because the price for the nationalized jute has

not yet been paid, the nationalization of the property is not a "fait accompli". Thus, the Court stated, "Complete fruition of the act will come about, if at all, when the Bangladeshi government acquires the proceeds of the jute sale." (JA 231-32) It then concluded, with misplaced reliance upon *United Bank Limited* v. *Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Menendez* v. *Saks and Co.*, 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682 (1976); and *Tabacalera Severiano Jorge, S.A.* v. *Standard Cigar Co.*, 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924 (1968), that absent a "fait accompli" the Act of State Doctrine was not applicable.

Neither *Saks*, nor *United Bank*, nor *Tabacalera*, support this conclusion. Each of those cases involved the attempted confiscation by a foreign sovereign, of assets located in the United States. Thus, the confiscations could not be completed without the affirmative participation of United States courts. In the instant case, seizure of the property by Bangladesh was effected wholly outside the United States. The title to the property passed without any help whatever from United States courts. This Court is not asked to perfect a title, but to determine rights deriving from that title.

Were the Court below correct that an act of nationalization is not complete until the nationalizing government "acquires the proceeds of the . . . sale", there would be sparse application, indeed, of the Act of State Doctrine.

The *Sabbatino* case, supra, would certainly have been decided otherwise since that was a classic case of a dispute over proceeds to property previously expropriated by the Cuban government; the expropriation of the jute here by Bangladesh was no less complete than was that of the sugar in *Sabbatino*. Here, as in *Sabbatino*, it is a matter merely of recognizing the consequences of title changes already effected.

In language, equally applicable to the instant case, the Court in *Sabbatino* stated:

> . . . It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. at 430; see *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 787-88 (1972) (dissenting opinion).

In truth, it is difficult to conjure a fact situation in which the United States has a less pressing public policy interest than is present here. The dispute is essentially one between two foreign governments, with both of whom the United States maintains friendly relations. The bills of lading around which the controversy revolves were issued and nationalized within the territory of Bangladesh, the goods which they represent were shipped directly from what is now Bangladesh to the Dominican Republic. The happenstance that the purchase price was to be paid here does not provide reason to extend United States public policy to the territory of Bangladesh.

Indeed, policy interests actually point in the opposite direction; to affirm the decision below would be to fly in the face of the law of merchant by awarding the proceeds of the sale of property to one other than the owner of the bills of lading. It emasculates the governing principle that "possession [of a bill of lading] is equivalent to the possession of the goods themselves . . ." *Malabar Steamship Co.* v. *Central Bank of India, Ltd.,* 184 I.C. at 230. (See discussion at pp. 12-14, supra.)

There simply is no cause in this case, either in law or in policy, to upend judicial precedent of over half a century by circumscribing the Act of State Doctrine and re-examining the consistency of Bangladesh's territorial public acts in the light of United States public policy. See *Ricaud* v.

American Metal Co., supra; *Oetjen* v. *Central Leather Co.*, supra; *Bernstein* v. *Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir.), cert. denied, 332 U.S. 772 (1947) Nor can the issue be disposed of by recognizing the transfer of legal title to the bills of lading but denying the title holder the right to the proceeds. Such a dichotomy "would deprive the transfer of 'title' of all significance except as regards the right to retain a scrap of worthless paper." *United States* v. *Guaranty Trust Co.*, 293 U.S. at 348. It would also effectively overrule *Sabbatino* and substantially limit the Act of State Doctrine as a meaningful legal principle.

POINT III

The Bangladesh expropriation of enemy alien property having been effected outside the United States, did not do violence to United States public policy.

Literally from the inception of this nation to the present day, the Supreme Court has uniformly recognized the right of the United States to confiscate the property of enemy aliens, without compensation, in time of war. According to the Supreme Court, "There is no constitutional prohibition against confiscation of enemy properties [citations omitted]." *United States* v. *Chemical Foundation*, 272 U.S. 1, 11 (1926). The power to confiscate is held to derive from Congress' power to make war under the Constitution, U.S. Const. art. 1, § 8, cl. 11. *Cities Service Co.* v. *McGrath*, 342 U.S. 330 (1952); *Cummings* v. *Deutsche Bank und Discontogesellschaft*, 300 U.S. 115 (1937); *United States* v. *Chemical Foundation*, 272 U.S. at 11; *Stoehr* v. *Wallace*, 255 U.S. 239 (1921); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268 (1871); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). It is "untrammeled by the due process or just compensation clause". *Cummings* v. *Deutsche Bank und Discontogesellschaft*, 300 U.S. at 120.

In *United Bank Ltd.* v. *Cosmic International, Inc.*, supra, it was urged upon this Court that since public policy against

confiscations derived from the Constitution, *Republic of Iraq* v. *First National City Bank,* 353 F.2d 47, 51-52 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966), it followed that wartime confiscations of enemy alien property, having constitutional sanction, could hardly be violative of public policy. This Court disagreed, holding that, notwithstanding the recognized Constitutional exception for wartime confiscations, public policy still barred confiscation by a foreign belligerent of enemy alien property located within the United States.

The Court below expressly adopted this holding (JA 233) and thereupon proceeded to rule that the nationalization in the instant case must likewise violate public policy. But the instant application is a non sequitur, for the cornerstone of the *United Bank* holding—the presence within the United States of the enemy alien property sought to be confiscated—does not exist in this case. Here, it is uncontroverted that the nationalized properties were negotiable bills of lading physically located within the boundaries of Bangladesh, the acting state, embodying title to jute situate in the Dominican Republic.

The instant case involves a territorial confiscation as in *Ware* v. *Hylton,* supra, and its progeny, and not a confiscation of U.S. situs property as in the *United Bank* case. It is certainly well within the factual framework of *Cities Service Co.* v. *McGrath,* 342 U.S. 330 (1952), where the Supreme Court upheld the confiscation of bearer bonds issued by American companies, notwithstanding that the bonds were held abroad by enemy aliens.

Viewed from the perspective of almost 200 years of judicial history confirming the legality of confiscations of enemy alien property under the United States Constitution as a right of belligerency, it admits of no doubt that the confiscation by Bangladesh, within its territory, of Pakistan property in time of war could not "violate some fundamental principle of justice, some prevalent conception of

good morals, some deep-rooted tradition of the common weal". *Loucks* v. *Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918).

The principles of comity, and not public policy, are paramount here and require giving effect to the Bangladesh decrees.

Conclusion

The decision of the United States District Court should be reversed and judgment awarded to Rupali Bank. If a violation of public policy should be found to exist, the cause should be dismissed rather than determined on the merits. It is respectfully submitted that, in no event, should United States law be substituted for applicable foreign law in this essentially foreign transaction so as to effect a disposition on the merits.

Dated: New York, N.Y.
June 30, 1977

Respectfully submitted,

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EXHIBIT A

TESTIMONY OF G.H. MALIK

Rupali Bank v. Provident National Bank,
Civ. No. 72-1653 (E.D. Pa.)

may be expressed or may be implied in the conduct of the principal or agent respectively, and it's just one more point, if I may, on that. I'm just referring to Section in Hallsburys Law of England dealing with revocation and specifically the motive revocation which is the revocation need not necessarily be by formal instrument. A deed may be revoked by word of mouth or the principal may intervene in the course of negotiations.

Q Is an authority on the law of England considered to be germane by a court sitting in Pakistan up to the date of the surrender which was, I think, December 16th?

A Yes.

Q And I mean by that in both parts of Pakistan up to that date?

A Yes.

Q Why is that?

A Because the law of contract like many other laws of Pakistan are based on the English law, and most of the statutes like Contract Act, the Code of Civil Procedure, our codification with a few modifications here and there of the English common law.

Q Aside from whatever modifications may be achieved in the statutory embodiment, is it considered appropriate in the courts of Pakistan to refer therefore to English common law interpreting the same subject matter?

A Yes, sir, not only is it considered appropriate it is sometimes imperative. When we have no other authority or material we follow them.

Q And is it similarly considered appropriate to look to Indian law as it may have been initiated?

A Yes, sir.

Q Why is that?

A Because Indian law also derived, it was derived from the English common law and when Pakistan came into being in 1947 it continued those laws, and Bangladesh continued as far as I know the laws which were in force when it broke away from Pakistan.

Q We had introduced, I think, or mentioned at least yesterday just such an act as I understood it at least to accomplish that result of Bangladesh. I would like to go now to perhaps the last topic that we will cover and that is the subject of the jurisdictional point, Mr. Malik.

A Yes, sir.

Q First of all, would you describe the several provisions of the Code for us as they commence with Section 9, I believe.

A Yes, Section 9 of the Code of Civil Procedure.

Q Let's start with a caption there. What does the entire part one refer to?

EXHIBIT B

BILL OF LADING ACT OF 1856

PAKISTAN

1. Short title and commencement.—(1) This Ordinance may be called the Bengal State Prisoners Regulation (Amendment) Ordinance, 1958.

(2) It shall come into force at once.

2. Amendment of section 12-A, Regulation III of 1818.—In section 12-A of the Bengal State Prisoners Regulation, 1818 (Regulation III of 1818),—

(a) after the word "Sind" the word "and" shall be omitted, and

(b) after the words "Leased Areas" a comma and the words "the Baluchistan State Union and the State of Bahawalpur and the State of Khairpur" shall be added at the end.

Bengal Tenancy Act VIII of 1885.—See Bengal Code, Vol. I, Page 481 (1913 Edition).

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[1][(THE) [2]** BILLS OF LADING ACT, 1856]

(Act No. IX OF 1856)

(11th April, 1856)

An Act to amend the Law relating to Bills of Lading

Preamble.—Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property;

And whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid; It is enacted as follows:—

NOTE

A Bill of Lading is a receipt for goods shipped on board a ship .... It is not the contract .....but it is excellent evidence of the terms of the contract—Taj Mohammad & Co.—9 DLR 197 (DB). Clause about law applicable incorporated in Bill of Lading —Whether binding see Mackinon Mackenzie & Co.—9 DLR 619 (DB). Condition in Bill of Lading about presentation of claim—does not apply to bringing of suit—United Oriental Steamship Co.—10 DLR 507. Clause in Bill of Lading regarding jurisdiction of Court is binding on parties—See Taj Mohammad & Co.—9 DLR 197. Lighterage and demurrage mentioned in freight column—Not paid as such by shippers cannot be treated as such—Mohammadi Steamship Co.—Ltd.—12 DLR 600=PLD 1961 D. 132.

1. Rights under bills of lading to vest in consignee or endorsee.—Every consignee of goods named in a bill of lading, and every endorsee of a bill of

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[1]Short title given by the Short Titles Act, 1897 (XIV of 1897). This Act is based on the Bills of Lading Act, 1855 (18 & 19 Vict., c. III).

It has been declared to be in force in all the Provinces and the Capital of the Federation except the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), s 3.

It has been declared, by notification under s. 3(a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts namely :—

Sind ... ... See Gazette of India, 1880, Pt. I, p. 672.

The District of Sylhet ... ... Ditto ... 1879, Pt. I. p. 631.

[2]The word "Indian" rep. by the Federal Laws (Revision and Declaration) Act, 1951 (XXVI of 1951), s. 3 and II Sch.

lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2. **Not to affect right of stoppage in *transitu* or claims for freight.**—Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*[1], or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. **Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master, etc.**—Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board:

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresetation, by showing that it was caused without any default on his part and wholly by the fraud of the shipper or of the holder, or some person under whom the holder claims.

[THE] BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886.

[2]ACT No. VI of 1886

[8th March, 1886]

An Act to provide for the voluntary Registration of certain Births and Deaths for the establishment of General Registry Officers for keeping Registers of certain Births, Deaths and Marriages, and for certain other purposes.

Whereas it is expedient to provide for the voluntary registration of births and deaths among certain classes of persons, for the more effectual registration of those births and deaths and of the marriages registered under Act III of 1872, or the Christian Marriage Act, 1872, and of certain marriages registered under the Parsi Marriage and Divorce Act, 1865[3], and for the establishment of general registry offices for keeping registers of these births, deaths and marriages;

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[1]As to stoppage in transit, see the Contract Act, 1872 (IX of 1872), ss. 99-106.

[2]For Statement of Objects and Reasons, see Gazette of India, 1885, Pt. V, p. 12; for Report of the Select Committee, *see ibid.*, 1886, Pt. IV, p. 103; and for Proceedings in Council, see ibid., 1885 Supplement, pp. 14 and 87, and ibid., 1886, p. 290.

This Act has been applied to Phulera in the Excluded Area of Upper Tanawal to the extent the Act is applicable in the N.-W.F.P., subject to certain modifications; and also extended to the Excluded Area of Upper Tanawal (N.-W.F.P.) other than Phulera with effect from such date and subject to such modifications as may be notified, see N.-W.F.P. (Upper Tanawal) (Excluded Area) Laws Regulation, 1950.

[3]See now the Parsi Marriage and Divorce Act, 1936 (3 of 1936).

EXHIBIT C

MALABAR STEAMSHIP CO.

v.

CENTRAL BANK OF INDIA, LTD.

Sind Judicial Commissioner's Court

below was wrong in deciding that the mortgagees are entitled to withdraw this money for it had already disposed of the matter on June 24.

The application is, therefore, allowed but there will be no order for costs.

D. *Application allowed.*

SIND JUDICIAL COMMISSIONER'S COURT

First Appeal No. 59 of 1935
September 23, 1938
DAVIS, J. C. AND TYABJI, J.

FIRM MALABAR STEAMSHIP Co.— APPELLANTS

versus

CENTRAL BANK OF INDIA, LTD. AND OTHERS—RESPONDENTS.

Shipping—Bill of lading—What is, stated—Possession of bill of lading, whether equivalent to possession of goods specified therein — On transfer of bill of lading property in goods, if passes to transferee—Bill of lading, when operates as document of title—Liability of shipping company — M purchasing bags of foodstuff and putting them in lighter for transhipment to ship expected to arrive next day—Ship not arriving as expected—M in anticipation of her arrival obtaining from manager of shipping company bills of lading duly filled—M pledging bills of lading with Bank, obtaining certain amount and absconding — All bags confiscated by Police on complaint by unpaid vendor of M and ship sailing without consignment—Suit by Bank against Shipping Company, its manager, M and unpaid vendors for recovery of amount — Shipping Company held owed duty to Bank of not issuing bills of lading so long as goods were not on board the ship — Principle of estoppel held applied and company were bound by statements in bill of lading and were liable to compensate Bank for loss caused by their action—M's fraud held did not affect rights of Bank—No valid charge held, was created in favour of Bank by pledging of false bill of lading — Bank held had no claim against goods or against unpaid vendors.

A bill of lading is a document of title signed by the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. The bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves has by mercantile usage the same effect as an actual delivery in the circumstances. On a transfer therefore of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties to the transferee provided that the transferor was competent to dispose of the goods. These attributes attach only to a true bill of lading and not to a false bill of lading, to goods shipped and not to goods intended to be shipped, and an essential condition of the operation of a bill of lading as a document of title and as a symbol of the goods is that the goods are on board as the bills of lading certify. It is essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself. [p. 230, col. 1.]

One *M* purchased in the local market some 200 bags of *atta*, and 80 bags of rice and after lodging the shipping bills with the Customs on January 16, he obtained the necessary permission to export and the goods were put in lighter for transhipment to the ship which was expected to arrive on January 17. But she did not arrive as expected, and in anticipation of her arrival, *M* obtained from the Manager of the Shipping Company bills of lading duly filled in which he pledged with the Bank the same day and on those bills of lading backed by the insurance policies he obtained from the Bank Rs. 5,038-8-0 and disappeared. On January 18, one of the sellers made a complaint to the Police of an offence of cheating against *M* with respect to the *atta* sold to him, and the Police seized not only the *atta* in respect of which the unpaid vendor had complained, but also the rice which formed part of the same consignment. As a result, on the 19th, the ship sailed without this consignment which was never put on board. The Bank sued the Shipping Company, its Manager, *M* who had absconded and the unpaid vendors of *atta* and rice purchased by *M*:

Held, that the Shipping Company owed to the Bank as an indorsee of the bill of lading a plain duty not to issue a bill of lading for goods not on board. The case against the Shipping Company could be dealt with simply on the principle of estoppel. The Company were bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition although they were not received on board at all. The Bank in consequence acted to their detriment in advancing money to the shipper *M* and the Shipping Company was liable to compensate the Bank for loss suffered by their action. Ordinarily the measure of damages was the value of the bills of exchange drawn against the bills of lading. Neither the shipping documents nor boat notes were documents of title and even if the shipper *M* had defrauded the Shipping Company, the fraud did not affect the title of the Bank, they being indorsees for value without notice. No valid pledge in favour of the Bank was created when the bills of lading were pledged with the Bank in exchange for their advance. Apart from the pledge of the bill of lading there was no bailment to the Bank and the Bank had no claims against the goods in possession of the unpaid vendors or against the unpaid vendors. The Bank was not concerned in whose possession the goods were then or in future. Even if the Bank had a claim against the unpaid vendors, this would not prevent them enforcing their undoubted claim against the shipping company. *Compania Naviera Vascongada* v. *Churchill & Sim* (6) and *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* (11), relied on.

F. A. against the judgment and decree of Kupchand Bilaram, A. J. C., dated July 15, 1935.

Mr. *Srikishindas H. Lulla*, for the Appellants.

Messrs. *Dipchand Chandumal, Hukumat Rai M. Eidnani, Fatehchand Assudomal, Khanchand Copaldas*, and *Kundanmal*

Dayaram, for Respondents Nos. 1, 3, 4, 5 and 6, respectively.

Mr. Subramanier Iyer (Respondent No. 7) in person.

DAVIS, J. C.—This is an appeal by the Malabar Steamship Company against a judgment of Rupchand, Additional Judicial Commissioner, against the Shipping Company in favour of the plaintiffs, the Central Bank of India, Ltd., for Rs. 4,095-13-0 with interest at six per cent. per annum and costs. There were in all seven defendants, defendant No. 1 being the Shipping Company, defendant No. 2, the Manager of the Company, defendant No. 3, the shipper, who absconded and was the principal cause of the trouble, and defendants Nos. 4 to 7, the unpaid vendors of the goods sold to the shipper and which defendant No. 4 caused to be seized by the Police while in the lighter and before they were put on board the ship. The Judge, however, made no order against defendant No. 2, the Manager of the Company, as the Company accepted responsibility for his acts; an *ex parte* decree was passed against defendant No. 3 for the same amount as against the Shipping Company, while the Judge dismissed the suit against defendants Nos. 4 to 7, the unpaid vendors, on the ground that as the bills of lading were issued before the goods were on board, no valid pledge was created in favour of the Bank who had therefore no claim against the goods or against the unpaid vendors. The Shipping Company have appealed and joined as respondents the plaintiff Bank and the Manager of the Shipping Company, the shipper and the unpaid vendors.

Now the main facts in the case are not in dispute. One Maganlal trading as Dhirajlal Maganlal purchased in the local market some 200 bags of *atta*, 225 bags of *paparkhar* and 50 bags of rice and after lodging the shipping bills with the Customs on January 16, 1931, he obtained the necessary permission to export and the goods were put in lighter for transhipment to the *s. s. Janaki* which was expected to arrive in Karachi on January 17, but she did not arrive as expected, and in anticipation of her arrival, this Maganlal obtained from the Manager of the Shipping Company bills of lading duly filled in which he pledged with the Bank the same day and on those bills of lading backed by the insurance policies he obtained from the Bank Rs. 5,038-6-0 or something less and disappeared. Late at night on January 18, one of the sellers made a complaint to the Police of an offence of cheating against this Maganlal with respect to the *atta* sold to him, and the Police after obtaining from the City Magistrate the necessary orders, seized not only the *atta* in respect of which the unpaid vendor had complained, but the rice and *paparkhar* which formed part of the same consignment. As a result, on the 19th, the *s. s. Janaki* sailed without this consignment which was never put on board. One of the other vendors supplemented the action of the Police by filing a suit in the Small Cause Court against Maganlal and obtained attachment before judgment. As the goods were of a perishable nature, both the City Magistrate and the Judge of the Small Cause Court allowed the unpaid vendors to sell the goods on their giving security to answer to the Court for the value of the goods when called upon and security was given.

Mr. Lulla for the appellent Shipping Company first based his case upon the Judge's reliance upon the statement of the law by Ashhurst, J. in *Lickbarrow* v. *Mason* (1). The Judge, he argued, had proceeded upon the assumption that if there are two innocent parties, both must not suffer; one the more innocent must be compensated. It is true that the words of the Judge can be so read, and he does not refer to the duty of the Shipping Company to the Bank. Lord Sumner in *E. Jones & Co.* v. *Waring and Gillow* (2) at p. 692, said:

> "The question, which of the two innocent persons is to suffer by third party's fraud, and the proposition, that some one "acts to his detriment on the faith of" something done by another, never seem to me clear in themselves. The question assumes, that the law must in such a case interfere on behalf of one or the other. This does not follow without more."

Lord Sumner goes on to say:

> "There was no duty between Jones, Ltd., and Waring-Gillow, Ltd., and without that, the wide proposition of Ashhurst, J. in *Lickbarrow* v. *Mason* (1) at p. 70, would not apply: see observations of Lord Macnaghten and Lord Lindley in *Farquharson & Co.* v. *King & Co.* (3) at pp. 335 and 342 and of Lord Parmoor in *London Joint Stock Bank* v. *Macmillan* (4) at p. 836, which were apparently overlooked in *Commonwealth Trust* v. *Akotey* (5)."

(1) (1787-91) 1 Sm. L C 703; 2 T R 63 at p 70; 1 H Bl. 357; 1 R R 425; 4 Dr. P C 57; 60 East 20n.

(2) (1926) A C 670 at p 692; 95 L J K B 913; 135 L T 510; 32 Com. Cas. 6; 70 S J 756; 42 T L R 644.

(3) (1902) A C 325 at pp. 335 and 342; 71 L J K B 667; 86 L T 810; 51 W R 93.

(4) (1918) A C 777 at p 836; 88 L J K B 85; 119 L T 337; 23 Com. Cas. 415; 62 S J 650; 34 T L R 509.

(5) (1926) A C 72; 94 L J P C 167; 41 T L R 641; 134 L T 33.

Now it must be conceded to Mr. Lulla that the bare proposition that one of two innocent parties must be compensated is modified by this qualification of duty, but, in this case, there can, we think, be no doubt that this Shipping Company owed to the Bank as an indorsee of the bill of lading a plain duty not to issue a bill of lading for goods not on board. We also think, with all respect to the learned trial Judge, that there is some ground for the complaint that he has not dealt with this case, so far at least as the Shipping Company is concerned, from the point of view of estoppel, for had he done so, he would, we think, have greatly simplified the position. Now, so far as Mr. Lulla's argument is concerned, that the Shipping Company owed no duty to the Bank, the indorsee of the bill of lading, and indeed generally on the question of estoppel and bills of lading, we would refer to the judgment of Channell, J. in *Compania Naviera Vasconzada* v. *Churchill & Sim* (6) and to the following passage in particular:

"Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition. In England there appears no direct authority, but I think there are passages in several judgments in accordance with my view and none to the contrary. In America this question has been considered. In *Sears* v. *Wingate* (7) there is what seems a well-reasoned judgment as to the estoppel between the indorsee of a bill of lading on the one hand and the master and the shipowner on the other, and the rule is laid down that there is such an estoppel between the indorsee and the master as to statements in the bill of lading so far as they relate to matters which are, or ought to be, in the master's knowledge, and that the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Passages to the above effect from that judgment are quoted with approval in Parsons on Shipping and in the Scotch case, *Craig* v. *Delargy* (8) at p. 1231. Lord Shand quotes the passage from Parsons, and says: 'That passage from a writer of eminence on this subject undoubtedly gives countenance to the argument of the pursuers in this matter (that is, the argument that there was an estoppel), but I find that, with the exception of a case which is referred to in support of the concluding words of the passage, all the authorities referred to are American.' He goes on to say: 'I do not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though if it did arise, I must say that the American Law seems to me to be rested on reasonable grounds.' There is therefore the authority of Lord Shand's opinion on the question I am deciding. As the estoppel arises on a direct statement of fact which is incorrect, I do not consider that the question of negligence really arises, but, as I have already said, I should be prepared, if necessary, on the facts of this case to find the statement to be negligent, provided, of course, that there is a duty towards the indorsee to take care. As to this duty, although in my view the incorrect statement cannot be sued on directly as a breach of contract, yet I think the transfer of the contract to the indorsee does create a privity between the endorsee and shipowner, and this gets rid of the doctrine in *Le Lievre* v. *Gould* (9), and the other cases in which it has been held that a duty arising solely out of contract is only a duty towards parties to the contract. It was suggested that the words at the end of the fourth section of the Harter Act prevent any estoppel by saying that the statement is to be *prima facie* evidence. I think not, because it is not said, that it is only to be *prima facie* evidence, and it is consistent with the words of the section, that, upon something further happening —viz., the acting upon it—it may become conclusive, and also because what is said in the section is that the statement is to be *prima facie* evidence 'of the receipt of the merchandize therein described.' The object of these words, or, at all events, one object of them, appears to be to preserve the doctrine in *Grant* v. *Norway* (10), and Mr. Newton Crane, who was called before me as an expert in American Law to prove the Harter Act, said that, *Grant* v. *Norway* (10) is still recognized as law in America since the Harter Act. In order to make the statement in the bill of lading binding as an estoppel, it is of course necessary that it should have been acted on the prejudice of the person so acting."

We do not think therefore that it can be said that the Shipping Company did not owe a duty to the Bank, the indorsee of the bill of lading, and, we think, the case of the Bank against the Shipping Company can be dealt with simply on the principle of estoppel. The Company are bound by their own statements in the bill of lading that the goods were received on board in apparent good order and condition. They were, however, not received on board at all. The Bank in consequence acted to their detriment in advancing money to the shipper, and we think there can be no doubt that the Shipping Company must compensate the Bank for loss suffered by their action. Ordinarily we think the measures must be the value of the bills of exchange drawn against the bills of lading. This is given in the plaint as Rs. 5,035-6-0, while the total claim with interest is

(6) (1906) 1 K B 237; 75 L J K B 91; 94 L T 59; 54 W R 405; 11 Com. Cas. 49; 10 Asp. Mc. 177; 22 T L R 85.

(7) (1861) 65 Mass. 103.

(8) (1895) 6 R 1250 at p 1281.

(9) (1893) 1 Q B 491; 62 L J Q B 353; 4 R 274; 68 L T 626; 57 J P 181; 41 W R 368.

(10) (1851) 10 C B 665; 20 L J C P 93; 15 Jur. 296.

Rs. 5,110-6-0 The Judge has, however, allowed only Rs. 4 055-13-0 being the value of the goods in Karachi with insurance and Port Trust charges, but, as he points out, it is not possible to value the goods at the port of discharge. The Bank advanced something less than the full amount of the bills. No cross-objections have been filed against this finding of the learned Judge and his decree for this amount must stand. Mr. Lulla in the course of his argument relied upon the case in *Grant* v. *Norway* (10). The master of a ship, he argued, had no authority to sign for goods not put on board, and when it was pointed out to him that the master had not signed the bills but they were signed by the manager on behalf of the company, the manager, he argued, had no authority to sign, and he pointed out that the manager signed *per pro*, and he relied upon the judgment of Jervis, C. J. in the case above referred to, as supporting his argument of the manager's limited authority. But this case is a new case raised in appeal and the company cannot now be heard to deny responsibility for the acts of their manager, for in the trial Court they accepted responsibility for his acts, and it is because of this that the Judge did not pass any order against defendant No. 2. This defence was not taken in their written statement, and it cannot be taken now.

We have then to consider the case against the unpaid vendors, and Mr. Lulla has argued that before the Shipping Company can be held liable, the Bank must exhaust its remedies against the unpaid vendors, and he argued not only that the goods had passed into the possession of the shipowners so as to be on board the steamer and covered by the bills of lading, but that the bills of lading covered goods not only shipped but intended to be shipped and that a valid pledge in favour of the Bank was created when the bills of lading were pledged with the Bank in exchange for their advance. But on the question of fact we agree with the trial Judge that the goods had never left the lighter and passed into the possession of the shipowners. We do not believe that the manager ever received the boat's receipt from the lighterman; the boat's receipt was to be given to the master of the ship under s. 70, Sea Customs Act; the shipping bills are not documents of title but are required for the Customs: see ss. 137 and 140, Sea Customs Act. It was no part of the case of defendant No. 1 in the written statement that they had possession of the boat notes through their manager, and we agree with the trial Judge that the evidence of the manager cannot be relied on. It is true the property in the goods had passed from the unpaid vendors to the shipper, but the property remained with the shipper as possession remained with the lighterman on his behalf until the goods were seized by the Police. Moreover, neither the shipping documents nor boat notes are documents of title (see *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* (11) and even if the shipper Maganlal had defrauded the Shipping Company, the fraud would not have affected the title of the Bank being indorsees for value without notice: see *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* (11). Moreover, no fraud is pleaded or proved and no criminal offence has yet been proved against the absconding shipper. We find then as a fact that the goods were never on board and were never in possession of the Shipping Company. We are not here concerned with bills of lading in the new form "received for shipment." The three bills of lading in this case are in the form "received on board in apparent good order and condition."

The question then arises whether a valid charge was created in favour of the Bank by pledging of these bills of lading which purported to cover and did not in fact cover goods on board the *s. s. Janaki*, and indeed it was on the question of the validity of this pledge that the trial Judge decided the whole case not dealing with the question of estoppel.

Now there is no direct authority on this question, and so far as the Shipping Company is concerned, the principle of estoppel is a complete answer to the Shipping Company's defence and renders as regards them any consideration of this question unnecessary, but it is the shipowner only who is estopped from questioning the statements in the bills of lading, not third parties, and Mr. Lulla appearing for the Shipping Company argues that he can press the claims of the Bank against the goods in the possession of the unpaid vendors or against the unpaid vendors themselves. They are tied, he said, by equities.

In this case it is clear the unpaid vendors had no right of stoppage in transit; but if the Bank had no valid pledge it con-

(11) 32 S L R 502; 17 Ind. Cas. 561; A I R 1938 P C 152; 65 I A 265; I L R (1939) 2 Cal. 381; 10 R P C 275; 1938 A L R 367; 1938 O L R 235; 42 C W N 677; (1938) I M L J 834; (1938) M W N 437; 4 B R 519; 67 C L J 299; 40 Bom. L R 709 (P C).

cerns them nothing that the goods should be in the possession of the unpaid vendors.

Now a bill of lading is a document of title; it is a symbol of the goods; it represents the goods themselves, and it appears to us that as a document of title, it is a document of title to specified goods in specified place and that a pledge of goods not on board ship by way of the pledge of the bill of lading is no more a pledge of goods on board the ship than the deposit of the keys of warehouse *B* in which the pledged goods are not stored would transfer possession or evidence a pledge of goods stored in warehouse *A*. A bill of lading is a document of title signed by the shipowner or by the master or other agent of the shipowner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship. This is the definition given in Halsbury, Vol. 26, para. 229, p. 144 and it is the definition generally accepted, and the bill of lading is a symbol of the right of property in the goods specified therein. Its possession is equivalent to the possession of the goods themselves, and its transfer being a symbolical delivery of the goods themselves has by mercantile usage the same effect as an actual delivery in the circumstances. On a transfer therefore of a bill of lading by way of sale, mortgage or pledge, the property in the goods passes either absolutely or otherwise according to the intention of the parties to the transferee provided that the transferor was competent to dispose of the goods: Halsbury, Vol. 26, pp. 146-147. But we think these attributes attach only to a true bill of lading and not to a false bill of lading, to goods shipped and not to goods intended to be shipped, and that an essential condition of the operation of a bill of lading as a document of title and as a symbol of the goods is that the goods are on board as the bills of lading certify, for if it were to be held that the pledge of a false bill of lading passed any property in the goods, the indorsee of such a bill would not know if his goods were in Karachi or in China or Peru. It appears to us essential for the purpose of commerce that a necessary condition of the operation of a bill of lading as a document of title is the receipt on board the ship of the goods which the bills of lading cover and which it is so declared in the bill itself.

This being so we do not think the Bank had a valid pledge of the goods covered by these false bills of lading, nor has the Bank filed cross-objections against the judgment dismissing their suit against the unpaid vendors, and though we could doubtless in this suit as framed give the Bank against the unpaid vendors a relief, it does not seek under O. XLI. r. 33, Civil Procedure Code, did we consider a valid pledge of the goods was created in their favour, we do not think such a pledge was in law created.

But Mr. Lulla then urged that the Bank and the unpaid vendors were tied together by equities, that as against the unpaid vendors the Bank had a just claim. There was, however, no bailment to the Bank apart from the pledge of the bills of lading and we cannot see in *Nippon Yusen Kaisha* v. *Ramjiban Serowgee* (11) authority for the existence of these equitable rights, with which the Shipping Company wish to invest the reluctant Bank. We do not think therefore it is a matter which concerns the Bank in whose possession the goods for which they can obtain compensation from the shipping company are now or at any future time. Indeed should the Bank have a claim against the unpaid vendors, this would not prevent them enforcing their undoubted claim against the shipping company: see *Compania Naviera Vasconzada* v. *Churchill & Sim* (6) above referred to.

In the result, we see no reason to interfere with the judgment of the trial Court, and we think the appeal should be dismissed with costs. We also see no reason to interfere with the order of the trial Judge refusing costs to the unpaid vendors. They are not wholly blameless in this affair. The appeal is, therefore, dismissed with costs.

S. *Appeal dismissed.*

PATNA HIGH COURT

Criminal Revision No. 232 of 1939

May 19, 1939

AGARWALA, J.

Pandit HARIHAR TIWARI—COMPLAINANT.

—PETITIONER

versus

ETWARI GOP AND ANOTHER—ACCUSED

—OPPOSITE PARTY

Child Marriage Restraint Act (XIX of 1929), s. 10—Omission to hold preliminary inquiry—Accused making no objection—Result of trial going against accused—Accused, if can benefit by non-compliance by Magistrate of provisions of s. 10.

The object of s. 10, Child Marriage Restraint Act is that no one should be harassed by a prosecution under the Act until a Magistrate has satisfied himself

EXHIBIT D

LICKBARROW v. MASON

(House of Lords)

Jeman and *Graham* in reſpect of theſe goods; and that *Sandeman* and *Graham* had no claim to the cargo by way of lien, as factors, becauſe there can be no lien without poſſeſſion.

After hearing counſel on this writ of error, the following queſtion was put to the Judges: "Whether the money received by the pro- "duce of the cargo of the *Ceres* in the ſpecial verdict mentioned, "was upon the matter had and received to the uſe of the plain- "tiff?" And the lord chief baron having delivered the unanimous opinion of the judges in the negative, it was thereupon ORDERED and ADJUDGED, that the judgment of the court of King's Bench ſhould be affirmed; and that the record ſhould be remitted, *&c.*

JUDGMENT affirmed, MS. Jour. *ſab anno* 1790. p. 51.

Caſe 3.

William Nowell Lickbarrow and another, - - - } Plaintiffs
Edward Maſon and others, - Defendants } in Error,

14th *June* 1793.

** The Conſignor may ſtop goods *in tranſitu*, before they get into the hands of the Conſignee, in caſe of the inſolvency of the Conſignee: but if the Conſignee aſſign the bills of lading to a third perſon, for a valuable conſideration, the right of the Conſignor as againſt ſuch aſſignee is divested.——There is no diſtinction between a Bill-of-lading indorſed in blank and an indorſement to a particular perſon.

JUDGMENT of *The Exchequer Chamber* (reverſing judgment of K. B.) REVERSED.

The report of this caſe, as originally argued in *K. B.* is given in 2 *Term Rep.* 63. *Lord Mansfield* was not preſent; but the judgment given by *Buller J.* went very fully into the whole merits of the queſtion. He particularly remarked on the circumſtance of there being *four* bills of lading; as according to the common courſe of merchants there are uſually only *three*. This did not influence the judgment; but it was ſuggeſted by Mr. *J. Buller*, that in caſes of inſtruments, partly written and partly printed, ſuch a variation from cuſtom might lead to fraud.

The judgment in the *Exchequer Chamber*, as delivered by *Lord Loughborough* at conſiderable length, is reported in 1 *H. Black. Rep.* 357.; and in the notes there, are the caſes of *Feeran* v. *Bowers*, at Guildhall. 1753, before *Lee* C. J. and *Aſſignees of Burghall* v. *Howard*, before *L.d. Mansfield*, at Guildhall, *Hil.* 32 *Geo.* 2. both which caſes (particularly the former) were in point, in favour of the defendants.

See further on this queſtion of ſtopping goods *in tranſitu*, *Salomons* v. *Nuſſer*, 2 *Term Rep.* 674. and *Ellis* v. *Hunt*, 3 *Term Rep.* 465.**

THE plaintiffs in error, in *Eaſter term* 1787, commenced an action in trover in the court of *King's-Bench*, by bill againſt the defendants in error, and therein declared that they were poſſeſſed of 21 laſts, and 29 and a fourth ſacks of horſe beans, 20 laſts 34 ſacks of pigeon beans, 200 faggots, 130 matts, 12 deals, 2 ſtencheons, and 2 laths; which ſaid goods and merchandiſes afterwards came to the hands of the defendants in error, and that they had refuſed to deliver the ſaid goods to the plaintiffs in error, and had converted the ſame to their own uſe; to which ſaid action

2 Term Rep. 63. 1 H. Black. Rep. 357.

action the defendants in error pleaded not guilty; and issue being joined thereon, the cause afterwards, at the sitting after *Easter* term 1787, came on to be tried at *Guildhall, London*, before a special jury of merchants, when the defendants in error demurred to the evidence given on the part of the plaintiffs in error to support the said issue, and the plaintiffs in error joined in that demurrer, the record of which evidence, demurrer, and joinder in demurrer, are as follows; to wit *:

"Afterwards, on the day and in the year, and at the place within "mentioned, before the Hon. *Francis Buller*, the justice within writ-"ten, &c. stating the calling and swearing of the jury in the "usual manner; and the said *William Nowell* and *Ralph*, to "prove and maintain the issue within joined on their part and be-"half, alleged and shewed in evidence to the jury aforesaid, that "on the 22d day of *July*, in the year of our Lord 1786, certain "persons carrying on trade and commerce in the name, stile, and "firm, of *James Turing* and Son, at *Middleburgh*, in the province "of *Zealand*, did there ship the said goods and merchandizes "within mentioned on board a certain ship called the *Endeavour*, "whereof was then master *James Holmes*, for *Liverpool*, in the "county of *Lancaster*, by the order and directions, and on the "account of one *James Freeman*, then of *Rotterdam*, in *Holland*, "merchant. That the said *James Holmes*, as master of the said "ship, by one *William Rudolph*, then signed four several bills of "lading for the said goods and merchandize, of the following te-

* The short state of the facts is as follows:——*Turing* and *Son*, merchants, at *Middleburgh* in *Zealand*, on the 22d *July* 1786, shipped the goods in question, on board the *Endeavour*, for *Liverpool*, by the order and direction, and on the account of *Freeman* of *Rotterdam*. *Holmes*, as master of the ship, signed *four* several bills of lading for the goods unto order or to assigns; two of which were indorsed by *Turing* and *Son* in blank, and sent on the 22d *July* 1786, by them, together with an invoice of the goods, to *Freeman*, who afterwards received them; another of the bills of lading was retained by *Turing* and *Son*, and the remaining one was kept by *Holmes*. On the 25th *July* 1786, *Turing* and *Son* drew four several bills of exchange upon *Freeman*, amounting in the whole to 477l. in respect of the price of the goods, which were afterwards accepted by *Freeman*. On the 25th *July* 1786, *Freeman* sent to the plaintiffs the two bills of lading so indorsed, together with the invoice, in order that the goods might be taken possession of, and sold by them on *Freeman*'s account; and on the same day *Freeman* drew three sets of bills of exchange, to the amount of 510l. on the plaintiffs, who accepted, and afterwards duly paid them. The plaintiffs are creditors of *Freeman* to the amount of 542l. On the 15th *August* 1786, and before the four bills of exchange, drawn by *Turing* and *Son* on *Freeman*, became due, *Freeman* became a bankrupt: those bills were regularly protested, and *Turing* and *Son* were afterwards obliged as drawers, to take them up and pay them. The price of the goods so shipped by *Turing* and *Son* is wholly unpaid. *Turing* and *Son* hearing of *Freeman*'s bankruptcy, on the 21st *August* 1786, indorsed the bill of lading, so retained by them, to the defendants, and transmitted it to them with an invoice of the goods; authorising them to obtain possession of the goods on account of and for the use and benefit of *Turing* and *Son*, which the defendants received on the 23th *August* 1786. On the arrival of the vessel with the goods at *Liverpool* on the 28th *August* 1786, the defendants applied to *Holmes* for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of, and to and for the use and benefit of, *Turing* and *Son*. The defendants sold the goods on the account of *Turing* and *Son*, the proceeds whereof amounted to 557l., &c. Before the bringing of this action, the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the plaintiffs or *Freeman* have paid, or offered to pay, the defendants for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

" nor and effect; (that is to ſay,) "Shipped by the grace of God,
" in good order and well-conditioned, by *James Turing* and Son,
" in and upon the good ſhip called the *Endeavour*, whereof is
" maſter, under God for this voyage, *James Holmes*, and now
" riding at anchor in the harbour of *Middleburgh*, and by God's
" grace bound for *Liverpool*; to ſay, 21 laſts, 29 and a fourth
" ſacks horſe beans, 20 laſts 34 ſacks pigeon beans, together with
" 200 faggots, 130 matts, 12 deals, 2 ſtenchcons, and 2 laths for
" dunnage, and being marked and numbered as in the margin,
" and are to be delivered in the like good order and well-con-
" ditioned, at the aforeſaid port of *Liverpool*, (the dangers of the
" ſeas only excepted,) unto order or to aſſigns, he or they paying
" freight for the ſaid goods 35 s. ſterling *per* laſt, with ten *per cent.*
" primage, and 1s. ſterling *per* laſt hat money, to be diſcharged
" in fourteen days, and if longer detained, to be paid two guineas
" a day in name of demurrage, with primage and average accuſ-
" tomed. In witneſs whereof, the maſter or purſer of the ſaid
" ſhip hath affirmed to four bills of lading, all of this tenor and
" date, the one of which four bills of lading been accompliſhed,
" the other three to ſtand void, and ſo God ſend the good ſhip to
" her deſired port in ſafety, Amen. Dated in *Middleburgh*, 22d
" *July* 1786." Quantity unknown, which the ſaid *Edward*
" *Maſon*, *Cornelius Bourne*, and *John Pilkington*, by their counſel,
" admitted to be true. And the ſaid *William Nowell* and *Ralph*,
" by their counſel, further ſhewed in evidence to the jury afore-
" ſaid, that two of the ſaid bills of lading were afterwards in-
" dorſed by the ſaid *James Turing* and Son, in blank, (that is to
" ſay,) in the words following, "*James Turing* and Son;" and that
" on the ſaid 22d day of *July*, in the ſaid year of our Lord 1786,
" the ſaid two bills of lading ſo indorſed were tranſmitted and
" ſent by the ſaid *James Turing* and Son to the ſaid *James Free-*
" *man*, at *Rotterdam*, together with an invoice of the ſaid goods
" and merchandize within mentioned, and were there duly re-
" ceived by the ſaid *James Freeman*; that the ſaid *James Turing*
" and Son retained another of the ſaid four bills of lading ſo ſigned
" as aforeſaid, in their cuſtody and poſſeſſion, and that the remain-
" ing one of the ſaid four bills of lading was kept by the ſaid *James*
" *Holmes*, as maſter of the ſaid ſhip, which the ſaid *Edward*, *Cor-*
" *nelius*, and *John*, by their counſel, alſo admitted to be true. And
" the ſaid *William Nowell* and *Ralph*, by their counſel, alſo al-
" ledged, and further ſhewed in evidence to the jury aforeſaid,
" that after the ſaid goods and merchandizes were ſo ſhipped by
" the ſaid *James Turing* and Son, for *Liverpool* aforeſaid, (that is
" to ſay,) on the 25th day of *July*, in the ſaid year of our Lord
" 1786, the ſaid *James Turing* and Son drew four ſeveral bills of
" exchange, bearing date reſpectively the ſame day and year laſt
" aforeſaid, upon the ſaid *James Freeman*, for ſeveral ſums of
" money, amounting in the whole to the ſum of 5250 guilders,
" *Holland* currency, being of the value of 477 l. of lawful money of

" *Great*

60 Factor.

" *Great Britain*, for and in reſpect of the price of the ſaid goods " and merchandizes within mentioned, ſo as aforeſaid ſhipped by " the ſaid *James Turing* and Son, at and by the requeſt and direc- " tion of the ſaid *James Freeman*; and that the ſaid four bills of " exchange ſo drawn as aforeſaid, were afterwards duly accepted " by the ſaid *James Freeman* at *Rotterdam* aforeſaid, which the ſaid " *Edward*, *Cornelius*, and *John*, by their counſel, alſo admitted to " be true.

" And the ſaid *William Nowell* and *Ralph*, by their counſel, " alſo alledged and ſhewed in evidence to the jury aforeſaid, that " the ſaid *James Freeman*, on the 25th day of *July*, in the ſaid " year of our Lord 1786, tranſmitted and ſent to the ſaid *William* " *Nowell* and *Ralph*, at *Liverpool* aforeſaid, the ſaid ſaid two bills " of lading ſo indorſed as aforeſaid, and ſo as aforeſaid received " by him from the ſaid *James Turing* and Son, together with the " ſaid invoice of the ſaid goods and merchandizes within men- " tioned, in the ſame ſtate in which he the ſaid *James Freeman* re- " ceived them from the ſaid *James Turing* and Son, in order that " the ſaid goods and merchandizes might upon their arrival at " *Liverpool* be taken poſſeſſion of and ſold by the ſaid *William* " *Nowell* and *Ralph*, on his the ſaid *James Freeman*'s account, " and that the ſaid *James Freeman*, on the ſame day and year laſt " aforeſaid, drew upon the ſaid *William Nowell* and *Ralph*, three " ſets of bills of exchange, bearing date the ſame day and year " laſt aforeſaid, to the amount of 520l. of lawful money of " *Great Britain*; and that the ſaid *William Nowell* and *Ralph* " afterwards accepted the ſaid laſt-mentioned bills of exchange, " and the ſame have been duly paid by them the ſaid *Wil-* " *liam Nowell* and *Ralph*, and that the ſaid *William Nowell* " and *Ralph* are at this day creditors of the ſaid *James* " *Freeman*, to the amount of 542l. 16s. 6d. which the ſaid " *Edward*, *Cornelius*, and *John*, by their counſel, alſo admitted to " be true.

" And the ſaid *William Nowell* and *Ralph*, by their counſel, alſo " alledged and ſhewed to the jury aforeſaid, that on or before the " 15th day of *Auguſt*, in the year of our Lord 1786, and before " the ſaid four bills of exchange ſo as aforeſaid drawn by the ſaid " *James Turing* and Son upon the ſaid *James Freeman*, for and " in reſpect of the price of the ſaid goods and merchandizes ſo " ſhipped by them as aforeſaid, or either of them, became due " and payable, the ſame *James Freeman* became a bankrupt, and " abſconded and concealed himſelf, and all the ſaid laſt-mentioned " bills of exchange were duly and regularly proteſted, for the non- " payment thereof by the ſaid *James Freeman*, and the ſaid *James* " *Turing* and Son have ſince been compelled and obliged as drawers " of the ſaid bills of exchange, to take up and pay the ſame; and " that the price of the ſaid goods and merchandizes ſo ſhipped " by them as aforeſaid, is now due and owing to the ſaid *James* " *Turing* and Son, and is wholly unpaid and unſatisfied, which the

" ſaid

" ſaid *Edward, Cornelius*, and *John*, by their counſel, alſo admitted " to be true.

" And the ſaid *William Nowell* and *Ralph*, by their counſel, al- " ledged and ſhewed in evidence to the jury aforeſaid, that the " ſaid *James Turing* and Son having received advice of the ſaid " *James Freeman* ſo being become a bankrupt and inſ[olvent] on the " 21ſt day of *Auguſt*, in the year of our Lord 1786, [in]dorſed the " ſaid bill of lading ſo as aforeſaid retained by them in their cuſ- " tody and poſſeſſion, to the ſaid *Edward, Cornelius*, and *John*, " in the words and figures following; (that is to ſay,) " Deliver the " within contents to Meſſ. *Maſon* and *Bourne*, and Mr. *John Pil-* " *kington*, (jointly and ſeverally,) and to their order, and to no " other—*James Turing* and Son:" and that the ſaid *James Tu-* " *ring* and Son, on the ſame day and year laſt aforeſaid, tranſmitted " and ſent the ſaid bill of lading laſt mentioned, ſo indorſed " as aforeſaid, to the ſaid *Edward, Cornelius*, and *John*, to- " gether with an invoice of the ſaid goods and merchandizes, " and a power of attorney, bearing date the ſame day and year " laſt aforeſaid, ſigned by the ſaid *James Turing* and Son, where- " by the ſaid *James Turing* and Son impowered and authorized the " ſaid *Edward, Cornelius*, and *John*, to obtain poſſeſſion of the ſaid " goods and merchandizes within mentioned, for and on the ac- " count of them the ſaid *James Turing* and Son, and for their uſe " and benefit; and that the ſaid *Edward, Cornelius*, and *John*, duly " received the ſame on the 28th day of *Auguſt*, in the ſaid year of " our Lord 1786, at *Liverpool* aforeſaid, which the ſaid *Edward,* " *Cornelius*, and *John*, by their counſel, alſo admitted to be true.

" And the ſaid *William Nowell* and *Ralph*, by their counſel, " alledged and ſhewed in evidence to the jury aforeſaid, that the " ſaid ſhip called the *Endeavour*, whereof was maſter the ſaid " *James Holmes*, on the 11th day of *Auguſt*, in the year of " our Lord 1786, with the ſaid goods and merchandize on " board the ſame, ſet ſail and departed from *Middleburg* aforeſaid; " and afterwards, (that is to ſay,) on the 28th day of *Auguſt*, in " the year of our Lord 1786, arrived with the ſaid goods and " merchandize on board the ſame at *Liverpool* aforeſaid: that " thereupon the ſaid *Edward, Cornelius*, and *John*, for and on the " account of the ſaid *James Turing* and Son, then and there ap- " plied to the ſaid *James Holmes*, as being maſter of the ſaid " ſhip, for the delivery of the ſaid goods and merchandize to " them, and then and there produced and ſhewed to the ſaid " *James Holmes*, the ſaid laſt-mentioned bill of lading ſo indorſed " as aforeſaid, and the ſaid power of attorney. That thereupon " the ſaid *James Holmes* did deliver the ſaid goods and merchan- " dizes to the ſaid *Edward, Cornelius*, and *John*; and the ſaid " *Edward, Cornelius*, and *John* took poſſeſſion of the ſaid goods " and merchandize by virtue of the ſaid laſt-mentioned bill of lad- " ing and the ſaid power of attorney, for and on the account of, and " to and for the uſe and benefit of the ſaid *James Turing* and Son.

" That

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"That they the said *Edward, Cornelius*, and *John*, have since "sold and disposed of the said goods and merchandizes by the "directions, and for and on the account, and to and for the "use and benefit of the said *James Turing* and Son, and "that the proceeds thereof amount to the sum of 557 l. "11 s. 8 d. of lawful money of *Great Britain*, which the said "*Edward, Cornelius*, and *John*, by their counsel, also admitted to "be true.

"And the said *William Nowell* and *Ralph*, by their counsel, "also alledged and shewed in evidence to the jury aforesaid, that "before the exhibiting of the bill of the said *William Nowell* "and *Ralph*, against the said *Edward, Cornelius*, and *John*, they "the said *William Nowell* and *Ralph* demanded the said goods "and merchandize of the said *Edward, Cornelius*, and *John*, and "tendered to the said *Edward, Cornelius*, and *John*, the freight "and charges so incurred by them in respect thereof, and that "neither the said *William Nowell* or *Ralph*, or the said *James* "*Freeman*, have paid, or offered to pay, to the said *Edward*, "*Cornelius*, and *John*, or either of them, or to the said *James* "*Turing* and Son, or either of them, for the said goods and mer- "chandizes, or any sum of money on account or in respect "thereof, other than and except the said freight and charges so "incurred by the said *Edward, Cornelius*, and *John*, which the "said *Edward, Cornelius*, and *John*, by their counsel, also ad- "mitted to be true; whereupon the said defendants in error, by "their counsel, demurred to the evidence aforesaid, above "shewn to the jurors; and the plaintiffs in error joined in "demurrer, and the jury assessed contingent damages to the "said plaintiffs in error, to the sum of 542 l. 16 s. 6 d. besides "costs."

The court of King's Bench afterwards in *Michaelmas* term 1787, having *heard the demurrer to evidence solemnly argued twice by the counsel on both sides, gave judgment for the plaintiffs in error* to recover their damages, amounting to the sum of 544 l. 16 s. 6 d. and also 69 l. 13 s. 6 d. costs, amounting in the whole to 614 l. 10 s. But the said defendants in error brought a writ of error to reverse the above judgment, returnable in the Exchequer Chamber, and assigned errors therein, and the plaintiffs in error joined. The case was argued in the Exchequer Chamber, before the judges of the court of Common Pleas, and barons of the Exchequer, and the said judgment of the court of King's Bench was, by the said court of Exchequer Chamber, in *Hilary* term 1790, *reversed*.

The plaintiffs in error then brought the present writ of error in parliament, and assigned errors, praying a reversal of the judgment of the said court of Exchequer Chamber.

E. Bearcroft. C. Wood. On this writ of error the counsel for the plaintiffs went into very long arguments.—They set out with admitting the general right of the vendor to stop the goods *in transitu*, in case of the insolvency

inſolvency of the vendee, if the price of the goods is unpaid, and there has been no legal transfer of property by the vendee before the ſeizure; but they inſiſted that the right to ſtop goods *in tranſitu* exiſts only as between the vendor and vendee, and that it ceaſes where the intereſt of a third perſon is concerned; and that the vendee, who is poſſeſſed of a bill of lading, like that ſtated upon the record in this cauſe, which is made deliverable *to order or aſſigns*, and indorſed in blank, *by and in the firm of the vendors*, and *delivered by the vendors to the vendee ſo indorſed*, acquires a legal title to the goods contained in ſuch bill of lading; which title he may transfer to any third perſon for a valuable conſideration, and without fraud, or notice on the part of ſuch transfer, that the price of the goods is unpaid, and that ſuch transfer diveſts the vendor of his right to ſtop *in tranſitu*. To ſupport this poſition, they relied upon the caſes of *Evans* v. *Martlett*, 1 Lord *Raymond*, 271. *Wright* v. *Campbell*, 4 *Burr.* 2046. and *Caldwell* v. *Ball*, 1 *Term Reports*, 205, which have decided the point.

A bill of lading may be ſo framed by the ſhipper of goods as to avoid all riſk; he may make them deliverable to the *vendee only*, in which caſe his own right to ſeize *in tranſitu* will in every event remain, or what would ſtill be more fair and equally void of all danger, he may ſtate upon the bill of lading the account and credit upon which the goods ſpecified in the bill of lading were ſold, and whoever afterwards gives credit to the bill of lading would do it ſubject to thoſe rights which were diſcloſed by the bill; for if the aſſignee of the vendee has notice at the time of the transfer of the bill of lading that the price of the goods is unpaid, the plaintiffs in error admit that if the vendor ſeizes the goods *in tranſitu*, he may hold them even againſt the aſſignee of the vendee, until his debt is paid, becauſe it was fraudulent in the aſſignee of the vendee to attempt to get goods into his hands which he knew had not been paid for. On the other hand, if the vendor makes the bill of lading deliverable to order or aſſigns, and afterwards indorſes the bill with his own name, as *Turing* and Son, the original ſhippers of the goods in queſtion, did, he gives the vendee an authority to part with the goods at any time; and if a loſs happens, it is not competent to the vendor to complain of what it was in his power to have prevented, if he had uſed due caution in drawing up the bill of lading.

It is not neceſſary to ſay what would be the effect of a bill of lading made deliverable to order or aſſigns, but not indorſed by the vendors, or whether ſuch a bill of lading would by the delivery give title to the holder thereof, ſo as to diveſt the vendor of the right to ſeize *in tranſitu*; but they, *Turing* and Son, by having actually indorſed the bill of lading in this cauſe with their own names, have thereby made it negociable for the purpoſe of giving a good title to the goods to a *bona fide* purchaſor againſt intermediates, and have narrowed their right to ſeize *in tranſitu*.

The

64 Factor.

The right of the vendee under a bill of lading differs very materially from that of a bailee; the latter has the actual poſſeſſion of the goods, but not the right of property, except ſuch as ariſes from a lien upon them to the extent of his demand; whereas the vendee of goods conſigned by a bill of lading has, by the delivery of the bill of lading, a poſſeſſion which is *tantamount* to the actual poſſeſſion of goods at land, and he has the whole intereſt and property in the goods veſted in him by the bill of lading, inſomuch that in an action of trover, which cannot be maintained unleſs the plaintiff has property, the bill of lading is evidence of the vendee's property to maintain that action; and the caſe of *Hibbert* v. *Carter*, 1 *Term Reports*, 745. eſtabliſhes the poſition, that by the indorſement of the bill of lading, the property is ſo completely transferred to the indorſee, that the ſhipper of the goods has no longer an inſurable intereſt in them.

The plaintiffs in error have acquired their title fairly and honeſtly, and have paid a very large ſum of money, amounting to upwards of 520l. upon the faith of the bill of lading, which *Turing* and Son put into the hands of *Freeman*, with their indorſement thereon. By that act they enabled *Freeman* to go to market with the goods, and authorized him to conſider the goods as his own; *Turing* and Son truſted to *Freeman*'s perſonal ſecurity, by taking his acceptances, to the amount of the cargo; but the plaintiffs in error truſted to the bill of lading, which conveyed that title to the goods which *Turing* and Son parted with; and whenever it becomes a queſtion which of two innocent perſons ſhall ſuffer, it is but juſt that the man who has given credit, and who had iſſued an inſtrument by which he has enabled another to gain credit, ſhould be the ſufferer.

The queſtion conſidered in a commercial view, is of great magnitude and importance; for if it ſhould be eſtabliſhed as a rule of law, that the vendor of goods may, notwithſtanding he has delivered a bill of lading to the vendee, deliverable to order or aſſigns, regularly indorſed with his own name, ſeize thoſe goods *in tranſitu*, and defeat the right of a *bonâ fide* purchaſor from the vendee, it will ſtrike deeply at the very root of commerce; for in that caſe no merchant will be able to raiſe money upon a cargo of goods to anſwer the neceſſary exigencies of trade, until the actual arrival of the ſhip at the port of deſtination; neither can the cargo be diſpoſed of at ſea, although the ſale might be extremely advantageous to the vendee by the riſe of markets, for no merchant or trader would buy or lend money upon a commodity, a ſure title to which cannot be made out; the conſequence will be, that the greateſt merchant in *London* has no reſource in caſe his ſhip ſhould by accident be kept at ſea to a period beyond the time limited for the payment of the goods. The great object of commerce is a quick and ſpeedy ſale of goods; and it frequently happens that a merchant diſpoſes of his cargo by means of a bill of lading, to a very great advantage,

and

and has received the price of the goods before the ship arrives in port, and the merchant is thereby not only relieved from the danger of temporary inconveniencies, but is likewise enabled to extend his capital, and to enter into further mercantile concerns; whereas if he cannot transfer the goods whilst at sea, by his bill of lading, he may be ruined before his cargo comes to hand; and finally the indorsement of the bill of lading was the defendant's own act, which gave notice to all the world that the property in the goods was absolutely transferred and gone from the shippers.

T. Erskine. S. Shepherd.

On the other side it was strongly but unsuccessfully contended, that the defendants in error, being merely the agents of *Turing* and Son, (the vendors or consignors of the goods,) and having taken possession of them on their account, and for their benefit, the question must be considered as between *Turing* and Son and the plaintiffs in error. That a consignor of goods, sold to a vendee who becomes insolvent before actual delivery to him, has by law a right to stop such goods *in transitu*, and retain possession in default of payment; and the transmission of a bill of lading by the consignor to such vendee, cannot vest in the vendee such a property in the goods as to devest the vendor's right so to stop and retain them.

It has never yet been decided that a bill of lading is a negotiable instrument, but merely assignable, and therefore an indorsement or assignment of such bill of lading cannot convey to the indorsee or assignee thereof, greater rights or property in the goods to which such bill relates, than the original possessor or indorser of such bill had: and the right or property of the original holder or consignee of the bill in the goods to which it relates, being subject to the right of the vendor to stop such goods *in transitu*, it follows that the right or property of the assignee or indorsee of such bill of lading, must also be subject to the same right. *Turing* and Son, therefore, never having received value for the goods in question, and *Freeman*, the vendee, having become insolvent before the actual delivery thereof to him, the defendants in error, as the agents of *Turing* and Son, and under their authority, had a right to take possession of the goods, and retain them against *Freeman* the vendee, and all persons claiming under him, till the price thereof was paid to *Turing* and Son.

JUDGMENT of Exchequer Chamber reversed.

After hearing the counsel on this writ of error, the following question was put to the judges: "Whether the evidence given on "the part of the plaintiff, and confessed by the demurrer on the "part of the defendant, be sufficient in law to maintain the plaintiff's action?" And the judges having delivered their opinions *seriatim* with their reasons upon the said question, it was thereupon ORDERED and ADJUDGED, that the judgment given in the Exchequer Chamber, reversing a judgment of the court of King's Bench given for the plaintiff, be reversed: and it was further ORDERED, that the court of King's Bench do award a *venire facias de novo*, and proceed accordingly to law; and that the record be remitted, &c.

Due and timely service of Two copies
of the within BRIEF is hereby
admitted this 1st day of July 1977

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Attorney for APPELLEE